

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**CANDY K QUAIL**  
Claimant

**APPEAL NO: 07A-UI-04078-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**AVEKA MANUFACTURING INC**  
Employer

**OC: 03/25/07 R: 04  
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Candy K. Quail (claimant) appealed a representative's April 12, 2007 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Aveka Manufacturing, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 7, 2007. The claimant participated in the hearing. John Anderson appeared on the employer's behalf. During the hearing, Employer's Exhibits One through Three were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The claimant started working for the employer on November 15, 1999. She worked full time as assistant to the operations manager in the employer's chemical and feed production facility. Her last day of work was February 23, 2007. The employer suspended her as of March 5 and discharged her on March 7, 2007. The reason asserted for the discharge was violation of the employer's drug and alcohol policy.

On February 23, the day before the claimant was scheduled to begin a vacation period through March 2, the employer determined that the entire pool of employees currently working at the facility was to submit to a drug test. The claimant went to the local clinic and provided her urine sample. The employer could not establish what type of preliminary or confirmatory test method was used by the laboratory in its analysis, although the employer's policy specifies that the initial screening is an emit test, followed if necessary by a gas chromatography/mass spectrometry (GC/MS) test. On or about February 28 the laboratory's medical review officer contacted the claimant and indicated that her sample had tested positive for amphetamine and methamphetamine. The claimant denied consuming illegal drugs and reported to the medical review officer (MRO) that she took a variety of prescription and over-the-counter medications

which she felt could have given a false positive. The testing facility then reported the test results to the employer.

When the employer met with the claimant on March 5 the claimant again denied the use of illegal drugs and asserted that the prescription and over-the-counter medications could have caused a false positive. While the employer did suspend the claimant at that time, the claimant was told to provide some information from her doctor to support her claim. On March 6 the claimant did obtain and present a letter from her doctor indicating that of the medications taken by the claimant “these medications are chemically similar to methamphetamine and will give false positive test results when standard drug testing is completed. . . .In order to differentiate illicit vs OTC (over-the-counter) drug usage a specific test, the D & L isomer needs to be run on the urine sample that tested positive for amphetamine.” (Employer’s Exhibit Three.) The employer also consulted with the MRO who concurred that this D & L isomer test was the only method to rule out a false positive.

The cost to perform the D & L test is approximately \$300.00, in contrast to the approximately \$55.00 cost to the employer to have the initial tests run. On March 7 the employer advised the claimant that if she wished to have the D & L isomer test run, the employer would bear the cost if the test exonerated the claimant but she would bear the cost if the test did not clear the claimant. However, by this point the claimant was extremely frustrated with the process and refused to agree to any condition under which she could be responsible for paying for the test. The employer then determined to discharge the claimant for violation of the employer’s drug policy based upon the existing test results.

The employer did not present the claimant with any written or verbal notification of her right to also have the split portion of the original sample tested. The employer’s policy regarding testing of the split portion of the sample specifies that an employee who has been notified by the MRO of a positive reading “may request in writing within seventy-two(72) hours after notification . . . that a split specimen be reanalyzed . . .” The policy further specifies that the employer will notify the employee “of a positive result by certified mail with return receipt requested.”

#### **REASONING AND CONCLUSIONS OF LAW:**

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant’s employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

- a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

- a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
  - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
  - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
  - a. Manifest equal culpability, wrongful intent or evil design; or
  - b. Show an intentional and substantial disregard of:
    1. The employer's interest, or
    2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is violation of the drug policy by a positive test result. In order for a violation of an employer's drug or alcohol policy to be disqualifying misconduct, it must be based on a drug test performed in compliance with Iowa's drug testing laws. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). The Eaton court said, "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." Eaton, 602 N.W.2d at 558. In Harrison, the court

specifically noted the statutory requirement that the employer must give the employee a written notice of the positive drug test, sent by certified mail, return receipt requested, informing the employee of his right to have the split sample tested at a laboratory of his choice and at a cost consistent with the employer's cost. The employer did not provide the claimant with any written notice, by certified mail or otherwise. Further, the employer's policy only provides a 72 hour window of opportunity to request the split sample testing, in contrast to the statutory requirement that the employee must be given "seven days from the date the employer mails by certified mail, return receipt requested, the written notice to the employee of the employee's right to request a test . . ." Iowa Code § 730.5-7-i-(1). Even for these reasons alone, the employer has not substantially complied with the drug testing regulations.

In addition, the claimant presented the employer with sufficient medically competent evidence to rebut the presumption that the test results as reported in fact demonstrated a true positive; in order to establish that the claimant then was in fact in violation of the employer's drug policy, the burden must fall back upon the employer, not the claimant, to pursue the necessary additional testing that might have resolved the potential for a false positive identified by both the claimant's doctor and the MRO. Rather than pursue that testing method itself, the employer chose to rely on the prior test results which under the circumstances do not establish consumption of an illicit substance by a preponderance of the evidence. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

**DECISION:**

The representative's April 12, 2007 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs